APPENDIX

STIPULATION

IT IS HEREBY STIPULATED by and between plaintiff and defendant that the Court shall determine this action upon the facts hereinafter set forth in this Stipulation and upon the testimony of W. J. Simmons and J. F. Jodis contained in their respective depositions which are on file herein. Should there appear to be any inconsistency between the facts stated herein and the facts set forth in the aforesaid depositions, the depositions shall govern.

1. Plaintiff is a Delaware corporation engaged in the manufacture and sale of cotton gin machinery and steel buildings. Its products are sold in the United States and many foreign countries. Plaintiff and its products are well known to the cotton ginning industry and to a large degree orders for its products are prompted by its established reputation. From the standpoint of dollar volume it is the largest manufacturer of cotton gin machinery in the world. Substantially all manufacturing activities of plaintiff are carried on in the State of Texas; none are carried on in the State of Arizona. Its home office is maintained in Dallas and a branch office, among others, is maintained in Fresno, California.

2. Plaintiff consigns a stock of gin repair parts to Food Machinery and Chemical Corporation, Phoenix, Arizona. Such parts are sold by Food Machinery to its customers in Arizona and it pays to the State Tax Commission the transaction privilege taxes incident to such sales. Plaintiff, its employees and agents, have nothing whatsoever to do with such sales of repair parts. At regular intervals Food Machinery remits to plaintiff the wholesale price of repair parts theretofore sold by it.

3. A sales representative (W. J. Simmons) employed by, and reporting to the Fresno branch of plaintiff, solicits orders for plaintiff's products from persons and firms situated in the State of Arizona. All sales of cotton gins and steel buildings

are made pursuant to orders which are given by customers to said sales representative or sent directly by the customer to plaintiff's Fresno or Dallas office. Orders delivered to the sales representative are transmitted by him to the Fresno office and then forwarded to the home office at Dallas. Acceptance of all orders takes place at Dallas, Texas. Delivery of gin machinery is made to the customer on cars or trucks at Dallas, Texas. All billings are made and payments received by the Fresno or Dallas office of plaintiff.

4. Copy of a representative contract covering the sale of a cotton gin from plaintiff to a customer in Arizona is attached hereto, marked Exhibit "A" and by reference made a part hereof. Under the terms of the contract plaintiff will provide a machinery erector if desired by the customer. The gin machinery is shipped to the gin site in a knocked down condition and is there assembled and installed. According to the provisions of the contract the purchaser agrees to install and operate the machinery according to the printed directions furnished by plaintiff. When the services of the machinery erector are requested by the customer the erector supervises the assembly, installation and testing of the gin machinery. The cost of assembling and installing the gin machinery is minor in comparison with the cost of manufacturing the same. The assembly and installation of the gin machinery does not involve construction work and is done within a relatively short period of time. The assembly and installation is necessary in order to put the machinery into condition for the use for which it was destined. The erector supplied by plaintiff does not perform work over and above that required by the inherent nature of the gin machinery which is the subject of the sale. The products sold by the plaintiff are such as are used in the cotton ginning trade generally and might be sold to any customer in the regular course of business. They are capable of being dismantled and moved to and reinstalled at other sites.

5. Copy of a representative sales contract for a steel building is attached hereto, marked Exhibit "B", and by reference made a part hereof. The purchaser furnishes all labor for the erection of the buildings except a superintendent and one

helper furnished by plaintiff. Concrete work, plumbing and electrical work are the sole responsibility of the purchaser. The steel buildings are shipped to the purchaser in a knocked down condition and are assembled at the building site upon the foundation provided by purchaser. The cost of assembling the buildings is minor in comparison to the costs of manufacturing the same. The buildings are assembled within a relatively short period of time. The assembling of the steel buildings is necessary in order to put them into condition for the use for which they were destined. The superintendent and helper furnished by plaintiff do not perform work over and above that required by the inherent nature of the steel buildings which are the subject of the sale. The steel buildings sold by plaintiff are such as are used in the trade generally and might be sold to any customer in the regular course of business. They are capable of being dismantled and moved to and reinstalled at other sites.

6. When repair parts cannot be obtained from the stock maintained in Phoenix, Arizona by Food Machinery and Chemical Corporation, plaintiff ships gin repair parts to customers in Arizona f.o.b. Dallas or Fresno. Such sales of repair parts to Arizona customers are made pursuant to orders therefor received and accepted in Dallas or Fresno.

7. During the period from January 1st, 1954 to September 30th, 1956, plaintiff made sales to Arizona customers as disclosed by the following schedule:

	Gin Machinery Contracts	Steel Building Contracts	Repair Part Sales Dallas	Repair Part Sales Fresno	Totals
	945,834.44	62,396.33	9,043.27	171,239.31	1,189,621.62
Less:					
Frt & Erec.		8,182.73			
		54,213.60			

Sales on which tax was paid	348,286.94	10,175.10	6,221.77	78,180.67	442,864.48
Sales on which tax was not paid	597,547.50	44,338.50	2,821.50	93,049.64	737,757.14
2% of sales on which tax not paid	11,950.95	886.77	56.43	1,861.00	14,755.15

8. With respect to the gin machinery contracts totalling $945,834.44 referred to in paragraph 7 hereof, the services of an erector were supplied by plaintiff with respect to the following sales only:

Date	Name of Purchaser	Invoice No	Net Sale Price	Erectors' Expense Billed to Customer Time	Expense
8 9 54	Ariz. Cotton Gin-Mesa	8423	$90,660.40	1,755.00	594.54
8 26 54	Community Gin-Glendale	10378	2,329.97	149.00	4.00
"	" "	8268	2,329.97	149.00	4.00
6 15 54	Gila Gin-Gila Bend	4582	4,855.26	57.00	56.75

4 26 54	Producers C O Maricopa	2515	72,956.66	1,146.00	353.50
10 22 54	Producers C O Chandler	15717	85,316.77	1,209.00	437.00
8 22 55	Chandler Gin	9993	104,319.50	1,518.00	240.60
6 6 55	Marana Gin-Marana	4206	18,360.13	1,593.00	714.30
5 28 56	Casa Grande Gin-Casa Grande	4231	132,241.00	1,410.00	373.96
4 16 56	Gila Gin-Gila Bend	1584	16,367.55	282.00	157.91
3 30 56	Harris C G-Chandler	2077	10,355.00	36.00	8.30
6 28 56	Producers C O Greenfield	5851	5,774.10	332.00	124.10

9. In all cases in which plaintiff's customers paid to it an amount to cover sales tax in addition to the purchase price, plaintiff paid to defendant the sales tax incident to such transactions. Plaintiff failed to remit sales tax to defendant only in connection with those transactions where plaintiff's customers did not pay the tax, or an additional amount to cover the tax.

10. During the period covered by the sales referred to in paragraph 7 hereof plaintiff employed Joe E. May as an erector to perform work incident to the installation of gin machinery where requested by the purchaser. Mr. May is employed by, receives direction from and reports to plaintiff's Fresno branch. Mr. May resides in Phoenix, Arizona. His pay check and other mail from the Fresno branch is received at his residence. In addition to performing work as an erector Mr. May also en-

gages in the repairing of gins at the request of customers. Most of the calls from customers requesting his services are received at his residence in the evening. Some calls for his services are made to Food Machinery and Chemical Corporation. Such calls are received by Mr. W. J. Simmons or by Mr. J. F. Jodis and then relayed to Mr. May either by telephone in the evening or when Mr. May would next call at the Food Machinery office. Work or time sheets with respect to the services performed by Mr. May are prepared by him and forwarded direct to plaintiff's Fresno office. Mr. May is compensated by plaintiff upon the basis of services performed with a minimum monthly guarantee. Mr. May is furnished an automobile by plaintiff and he is reimbursed by plaintiff for all gas, oil and other expenses incident to the operation of the automobile. Mr. May furnishes his own hand tools.

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By: BERNARD T. CAINE
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(A.R. 13-22)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial before the Court sitting without a jury on the 31st day of October, 1958. The matter was submitted upon the Stipulation heretofore filed herein on the 11th day of June, 1958, the Memoranda of law submitted by respective counsel, and the oral arguments thereof. The Court being fully advised in the premises enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

The Court finds as a matter of fact:

1. By reference the Court adopts and herein incorporates all of the facts set forth in the Stipulation entered into between the respective parties and filed herein on the 11th day of June, 1958.

2. On or about December 17, 1956, defendant purported to determine that there was due and owing from plaintiff to defendant under the provisions of the Excise Revenue Act of 1935, as amended (Section 421301, A.R.S., et seq.) additional taxes in the amount of $14,213.29 by reason of business done by plaintiff during the period from January 1st, 1954, to the 30th day of September, 1956 (hereinafter referred to as the period involved herein). Within the time provided by Section 42-1338, A.R.S., plaintiff applied to defendant by petition in writing for a hearing, correction or redetermination of the aforesaid action taken by the defendant. Pursuant to such application the matter was heard by defendant on or about February 1st, 1957, and thereafter on or about the 28th day of February, 1957, defendant rejected the petition of plaintiff and refused to make a reduction, correction, or redetermination of such assessment.

3. On or about the 22nd day of March, 1957, plaintiff paid to defendant under protest purported additional assessment in the amount of $14,213.29 and delivered to defendant pursuant to the provisions of Section 42-1339, A.R.S., a written protest in form and substance as required by said section.

4. This action was instituted by plaintiff against defendant pursuant to the provisions of Section 42-1339, A.R.S.

5. During the period involved herein Food Machinery & Chemical Corporation permitted plaintiff's sales representative, W. J. Simmons, to use a desk and one of the telephones at its office in Phoenix, Arizona. In the classified section of the Phoenix Telephone Directory under the general heading

"Cotton Gin Machinery", appeared a listing "Murray Gins Parts Sales & Service—Food Machinery & Chemical Corp., 1450 E. Henshaw Rd.—Alpine 4-7118." This listing was arranged and paid for by Food Machinery & Chemical Corporation. Immediately under such listing appeared: "Simmons, W. J., 3601 N. 49 Scottsdale, Whitney 5-1151." The last mentioned listing was arranged and paid for by Mr. Simmons. The charges for the use of such telephone were included on Mr. Simmons' expense account and paid for by plaintiff.

6. During the period involved herein plaintiff did not in the State of Arizona:

(a) Maintain a local retail establishment;

(b) Sell to customers in the State of Arizona items maintained in stock by plaintiff in the State of Arizona;

(c) Maintain an office which was rendering services to local customers which were factors in establishing and holding its Arizona market;

(d) Elect to localize itself in the Arizona market with the advantages of a retail outlet in the State;

(e) Channel business through a local outlet to gain the advantage of a local business.

7. Plaintiff's transactions described in the aforesaid Stipulation were interstate in nature and not associated with any local business being conducted by plaintiff in the State of Arizona.

8. During the period involved herein plaintiff approached the Arizona market through solicitors only.

9. During the period involved herein all sales activities conducted by plaintiff in the State of Arizona were confined to the promotion or stimulation of sales exclusively in interstate commerce.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact the Court concludes as a matter of law:

1. During the period involved herein plaintiff did not engage in any local business activities in the State of Arizona which would subject it to a tax imposed upon the privilege of engaging in the business of selling tangible personal property at retail.

2. The State of Arizona may not impose upon plaintiff a tax for exercising in the State of Arizona the privilege of engaging in interstate commerce.

3. The activities of plaintiff, its employees and representatives in the State of Arizona during the period involved herein, including the listing by plaintiff's sales representative of his telephone number in the classified section of the City of Phoenix Telephone Directory under the general heading "Murray Gins Parts Sales & Service" were incident to the promotion or stimulation of sales exclusively in interstate commerce and therefore did not subject plaintiff to taxation under the provisions of the Excise Revenue Act of 1935, as amended (Section 42-1301, A.R.S., et seq.).

4. The State of Arizona cannot impose a tax upon the privilege of soliciting interstate business.

5. The contracts entered into by plaintiff, as described in the aforesaid Stipulation, for the sale and shipment of machinery and other products from out of the State into Arizona were interstate commerce, and incidental services performed by plaintiff in assembling, erecting, inspecting and testing such machinery in the State of Arizona did not deprive said contracts of their interstate character.

6. The agreement of plaintiff to furnish, at the request of a customer, an erector who would supervise the assembling, installation and testing of gin machinery sold to the customer

was a relevant and appropriate part of the sale and the entire transaction was one of interstate commerce.

7. The agreement of plaintiff to furnish a superintendent and one helper to assist the customer in assembling steel buildings sold to him, was a relevant and appropriate part of the sale and the entire transaction was one of interstate commerce.

8. The assessment by defendant of additional taxes upon plaintiff in the amount of $14,213.29 constitutes a burden upon interstate commerce contrary to and in violation of the provisions of the Constitution of the United States, is contrary to the express provisions of subdivision A.4. of Section 42-1321, A.R.S., is illegal and void.

9. Plaintiff is entitled to judgment against defendant in the amount of $14,213.29 together with interest thereon at the rate of 6% per annum from March 22, 1957, until paid, together with plaintiff's costs of suit incurred and expended herein. The Clerk of this Court is hereby ordered to enter judgment for plaintiff accordingly upon payment of the judgment fee.

Done in Open Court this 23 day of December, 1958.

CHARLES C. BERNSTEIN
JUDGE

Copy of the Foregoing Findings of Fact and Conclusions of Law received this ..... day of December, 1958.

ROBERT MORRISON
The Attorney General

By .....
Attorneys for Defendant

(A.R. 74-82)